

No. ~~277950-III~~

401045-II

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**

**OCT 22 2009**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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BRAD CHINN,

Respondent,

v.

CITY OF SPOKANE; WEST CENTRAL DEVELOPMENT, LLC,

Appellants.

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CITY OF SPOKANE'S REPLY BRIEF

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## **I. INTRODUCTION.**

COMES NOW, Appellant City of Spokane, by and through its attorneys, Howard F. Delaney, City Attorney, and Michael J. Piccolo, Assistant City Attorney, and submits its Reply Brief in response to the Brief of Respondent.

## **II. ARGUMENT.**

### **A. THE CITY COUNCIL CORRECTLY REVERSED THE HEARING EXAMINER'S DECISION BY DETERMINING THAT THE REZONE APPLICATION WOULD NOT SET A PRECEDENT FOR FUTURE REZONE APPLICATIONS.**

The argument asserted in the Brief of Respondent that the Hearing Examiner correctly ruled that approval of the rezone would create a precedent for other rezone application is based upon the incorrect interpretation of Land Use Policy 1.5. In order to argue that approval of the rezone application by West Central Development would create an automatic approval precedent for all other rezone applications, Land Use Policy 1.5 has to be misinterpreted by failing to distinguish between **freestanding retail** as discussed in Land Use Policy 1.5 and **retail sales and services associated with an office-retail zone**. As noted in the Opening Brief filed by West Central Development (Pages 11-

13), SMC 7D.120.110(6) provides that retail sales and services are allowed under the following restrictions: (1) when such uses are freestanding, they are limited to 3,000 square feet of floor area; or (2) when Retail Sales and Services are located in an office building, the Retail Sales and Services may only occupy up to ten percent (10%) of the total floor area. Both the Hearing Examiner and the Respondent incorrectly interpreted Land Use Policy 1.5 by failing to recognize the distinction between retail in an office-retail zone and freestanding retail use. Given the correct interpretation of Land Use Policy 1.5, approval of the rezone application by West Central Development does not create a precedent.

The City Council correctly analyzed the Hearing Examiner's concern regarding the issue of precedent in light of the requirements of SMC 17G.060.170(C)(5), which requires that:

The proposal will not have a significant adverse impact on the environment or the surrounding properties, and if necessary conditions can be placed on the proposal to avoid significant effects or interference with the use of neighboring property or the surrounding area, considering the design and intensity of the proposed use.  
(Emphasis added).

The Respondent is incorrect in its assumption that rezone decisions would be subject to discretionary decisions of the City Council. (Page 12 of the Respondent's Opening Brief.) The determination as to whether a proposal would have a significant adverse impact on the environment and the surrounding properties, and whether conditions needed to be imposed to avoid those effects would be made by the Hearing Examiner for rezone applications. SMC 17G.060.170 establishes decision criteria for the Hearing Examiner for land use applications, including rezone application.

In the West Central Development rezone application, the Hearing Examiner failed to include findings that there was any consideration given to whether conditions could be imposed to avoid the impact of the rezone to the environment and the surround properties. The City Council's decision specifically referenced the provisions of SMC 17G.060.170(C)(5) and concluded its decision with a remand order that its decision did not preclude the Hearing Examiner from imposing conditions as permitted by the Spokane Municipal Code. CP 15-17.

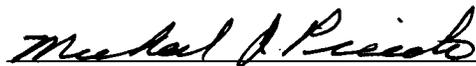
**B. LEGAL ARGUMENTS ASSERTED BY WEST  
CENTRAL DEVELOPMENT.**

The City of Spokane adopts by reference and incorporates the legal argument set forth by Appellant West Central Development contained in its reply brief as if fully set forth herein.

**III. CONCLUSION**

The correct interpretation of Land Use Policy 1.5 and the application of the decision criteria in SMC 17G.060.170 demonstrates that the City Council's decision is consistent with the Comprehensive Plan and that the Hearing Examiner erroneously interpreted the law and committed reversible error. For the reasons set forth above and in the City's Opening Brief, the City respectfully requests that the Court reverse the decision of the Superior Court and reinstate the decision of the City Council.

Respectfully submitted this 22<sup>nd</sup> day of October, 2009.



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Michael J. Piccolo, WSBA #20238  
Assistant City Attorney  
Attorney for City of Spokane  
Appellant

DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 22<sup>nd</sup> day of October, 2009, I caused a true and correct copy of the foregoing "City of Spokane's Reply Brief," to be delivered to the parties below in the manner noted:

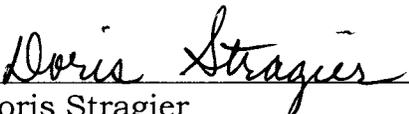
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